NOV 23 1992
OFFICE OF THE CLERK

No. 92-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT BRIEF IN OPPOSITION OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT, ET AL., KALIMA JENKINS, ET AL., AND AMERICAN FEDERATION OF TEACHERS, LOCAL 691

ARTHUR A. BENSON, II
ARTHUR BENSON & ASSOCIATES
Suite 1125
1000 Walnut Street
Kansas City, Missouri 64106
(816) 842-7603
Counsel for Respondents Kalima Jenkins, et al.

SCOTT A. RAISHER
JOLLEY, WALSH & HAGER, P.C.
204 W. Linwood
Kansas City, Missouri 64111
(816) 561-3755
Counsel for Respondent American Federation of Teachers, Local 691

* Counsel of Record

DAVID S. TATEL
ALLEN R. SNYDER *
PATRICIA A. BRANNAN
DANIEL B. KOHRMAN
HOGAN & HARTSON
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY WARD KEELER
BLACKWELL SANDERS MATHENY WEARY AND LOMBARDI
Two Pershing Square
2300 Main Street
Kansas City, Missouri 64141
(816) 274-6816
Counsel for Respondents Kansas City, Missouri School District, et al.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether any significant issue of federal law is presented by the Court of Appeals' dismissal of Petitioners' appeal for want of jurisdiction based on well-established legal principles strictly limiting federal appeals by non-parties?

2. Whether there is any basis for the Court to grant certiorari to consider issues regarding the merits of the questions raised by Petitioners' proposed intervention in light of the fact, as Petitioners acknowledge, that "[t]he Court of Appeals did not reach the merits" of these questions due to a " 'jurisdictional defect' " in Petitioners' appeal?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
COUNTERSTATEMENT OF THE CASE	1
A. The District Court Proceedings on the Merits	2
B. The District Court's July 23, 1990 Order	4
C. Petitioners' Post-Judgment Submissions	5
D. Proceedings Before the Court of Appeals	6
REASONS FOR DENYING THE WRIT	7
I. THE EIGHTH CIRCUIT'S DISMISSAL OF PETITIONERS' APPEAL, FOR FAILURE TO ESTABLISH APPELLATE JURISDICTION, WAS BASED ON CLEAR LEGAL PRINCIPLES AND PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW WORTHY OF THE COURT'S REVIEW	8
II. THE COURT SHOULD DECLINE TO CONSIDER ISSUES NOT REACHED BY THE COURT OF APPEALS AND RELIEF NEVER SOUGHT BY PETITIONERS IN EITHER OF THE LOWER COURTS	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257 (1978) 11
Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988) 8, 12
Campbell v. White, 721 F.2d 644 (8th Cir. 1983) .. 9
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) 10
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 11
Flast v. Cohen, 392 U.S. 83 (1968) 14
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 13
Jenkins v. Missouri, 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990) ..... *passim*
Karcher v. May, 484 U.S. 72 (1987) 8
Marino v. Ortiz, 484 U.S. 301 (1988) (per curiam) 8
Mistretta v. United States, 488 U.S. 361 (1989) 14
NAACP v. New York, 413 U.S. 345 (1973) 9, 10
Triax Co. v. TRW, Inc., 724 F.2d 1224 (6th Cir. 1984) 9
United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 9, 10
United States ex rel. McGough v. Covington Technologies Co., 967 F.2d 1391 (9th Cir. 1992) 9
United States v. Fruehauf, 365 U.S. 146 (1961) 13, 14
United States v. Robinson, 361 U.S. 220 (1960) 8
United States v. Yonkers Bd. of Educ., 801 F.2d 593 (2d Cir. 1986) 11
Washington v. Bumgarner, 882 F.2d 899 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) 9

RULES:

Fed. R. App. P. 4 ..... *passim*
Fed. R. App. P. 4(a) 9
Fed. R. App. P. 4(a)(5) 9, 10

TABLE OF AUTHORITIES—Continued

	Page
Fed. R. Civ. P. 24	6
Fed. R. Civ. P. 68	11
Sup. Ct. R. 10.1	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-539

ICELEAN CLARK, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

JOINT BRIEF IN OPPOSITION OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT, ET AL., KALIMA JENKINS, ET AL., AND AMERICAN FEDERATION OF TEACHERS, LOCAL 691

OPINIONS BELOW

The decision below by the Court of Appeals has been reported as: *Jenkins v. Missouri*, 967 F.2d 1245 (8th Cir. 1992). The district court's opinion is unreported.

COUNTERSTATEMENT OF THE CASE

Petitioners moved to intervene in this case in order to appeal the district court's approval of the parties' settlement of certain disputed claims. More than a month earlier, Petitioners had stated their objections to this settlement pursuant to court-ordered procedures permitting non-parties to present their views. Petitioners sought party status, however, only after the time to appeal had

expired. This Court is asked to review the Court of Appeals' subsequent dismissal of Petitioners' appeal for want of jurisdiction.

The Petition identifies no serious question, much less a significant federal legal issue, regarding the validity of the Court of Appeals' ruling, which was based on a proper application of Fed. R. App. P. 4 and this Court's precedents strictly limiting federal appeals by non-parties. Moreover, there is no basis for Petitioners' request that the Court consider the substance of the district court's order endorsing the parties' settlement agreement, because Petitioners themselves acknowledge the Court of Appeals "did not reach the merits" of that judgment due to a " 'jurisdictional defect' " in Petitioners' appeal. Pet. App. 18 n.10.

The Petition should be denied because both questions presented by Petitioners are well outside the range of matters the Court has recognized as appropriate for its discretionary review.

A. The District Court Proceedings on the Merits

This matter arises out of a compromise of disputed claims which is not supported by Petitioners, a group of non-party taxpayers who have sought intervention in this school desegregation case from time to time since 1987 in order to address specific issues of interest to them.[1]

[1] Petitioners Icelean Clark, *et al.*, represented by the Landmark Legal Foundation, first sought to intervene in this case in September 1987 for the limited purpose of challenging a desegregation funding order, which was subsequently upheld by this Court, in part, as modified by the Court of Appeals. *See* Pet. 8; *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990) ("*Jenkins II*"). Although this initial intervention motion was denied, the movants were allowed to participate in this case as amici curiae. Thereafter, the district court granted taxpayers permission to intervene for various limited purposes, all unrelated to Petition No. 92-539, in January 1989, October 1990 and January 1991. *See* Pet. 8 n.5.

The settlement agreement at issue involved funding for salary increases for teachers and other school staff as part of a comprehensive remedy to eliminate the vestiges of segregation in the Kansas City, Missouri School District ("KCMSD" or the "District"). On July 25, 1989, the district court approved a plan for a study of the adequacy of KCMSD salaries, to be conducted by an independent consulting firm. In March and April of 1990, based on the consultant's report, Respondents Kalima Jenkins, *et al.*, American Federation of Teachers, Local 691 ("AFT"), and KCMSD, *et al.*,[2] filed motions requesting desegregation-related funding of KCMSD salary increases. *See* Pet. App. A25-A26. The movants asserted such raises were necessary in order to attract and retain qualified personnel essential to the successful implementation of other court-ordered desegregation programs.

Respondents State of Missouri, *et al.* (the "State"), initially opposed the other parties' motions. As a result, the district court held four days of highly-publicized trial proceedings in Kansas City commencing on June 18, 1990. Prior to the end of trial, all of the parties to this case, including the State of Missouri, agreed to a compromise of disputed claims, and presented a proposed order reflecting their accord to the district court. Pet. App. A26.

On July 3, 1990, the district court issued an order scheduling a fairness hearing on the parties' proposed settlement. The court declared that the parties had agreed to, and the court was considering approval of, KCMSD personnel salary increases of $68 million over two years, one-half of which was to be funded by KCMSD itself, through an increase in the property tax levy from $4.00 to $4.96 per $100 of assessed valuation. *See* Pet. App. A14-A15. On July 3, the parties also held a press con-

---

[2] The Kansas City, Missouri School District Respondents include the school district itself and its superintendent, Dr. Walter L. Marks.

ference outlining the details of their settlement proposal.[3] On July 6, 1990, announcements appeared in two major Kansas City newspapers notifying the public, including Petitioners, of a July 17 fairness hearing on the parties' agreement and the text of the district court's July 3 order.

On July 12, 1990 the publicly elected KCMSD Board of Directors held an open hearing on the subject of the parties' settlement proposal. Representatives of the Petitioners attended and expressed to members of the Board their objections to the agreement. That same day, counsel for Petitioners filed with the district court, pursuant to "a procedure [established by the court] for non-party response to the proposed settlement," a substantial legal memorandum stating Petitioners' opposition to the settlement; in particular, Petitioners contested the proposed change in the KCMSD tax levy to fund salary increases and made other legal and factual arguments. Pet. 3. At the July 17 fairness hearing, Petitioners—through both their counsel and one of their members—presented oral arguments against the proposed settlement. *See* Pet. 4; Transcript of July 17, 1990 Fairness Hearing, 17-26, 68-69 (Bredemeier, Anderton). Once again, Petitioners focused their criticism on the tax increase provisions of the agreement. *Id.*

B. The District Court's July 23, 1990 Order

On July 23, 1990 the district court issued an order approving the parties' proposed settlement agreement. The court "authorized [KCMSD] to increase its property tax

[3] Petitioners state, without any citation to the record, that KCMSD "[s]chool board members were not apprised of the proposed tax increase until *after* settlement was reached" and thus, "did not participate in the decision to levy a tax increase pursuant to *Jenkins II* until it was already structured into the settlement." Pet. 3-4 (emphasis in original). This assertion not only is without basis in the record but, as officers of the Court, undersigned counsel for KCMSD hereby represent that Petitioners' assertion is false.

levy rate for the 1990 and 1991 tax years by 96 [cents] per $100 assessed valuation, so that the total . . . levy rate . . . may be increased to $4.96." Pet. App. A28. The court made this ruling pursuant to standards set forth by this Court and the Court of Appeals in *Jenkins II*. *Id.* A28-A29. The district court held "the tax rate of $4.96 is a reasonable maximum tax levy rate for KCMSD" and enjoined "any and all [state] laws . . . that would prevent the [KCMSD] Board of Directors . . . from increasing its tax levy rate to that level in order to fund these salary increases . . . ." *Id.* A29. On August 20, 1990 the KCMSD Board formally approved the tax levy rate increase publicly endorsed by the parties on July 3 and authorized by the district court on July 23.

C. Petitioners' Post-Judgment Submission

Thirty-six days after the July 23 Order, Petitioners filed in the district court a "Motion for Leave to Intervene for the Limited Purpose of Seeking Appellate Review" (filed August 28, 1990) ("Motion to Intervene"). Petitioners' Motion asserted they were entitled to pursue such an appeal, and to seek party status for this specific reason, based on their prior filing of a "protective notice of appeal" on August 22, 1990, the thirtieth day following the district court's July 23 Order. Pet. App. A19.

In their August 22 submission, Petitioners set forth no authority for the so-called "protective notice" procedure they proposed to follow, and acknowledged they were not parties to this case. *See* Pet. App. A20. Although Petitioners indicated they intended to seek intervention, they declined to say when, and made no request for an extension of time to do so beyond the thirty-day deadline for filing an appeal. *See* Fed. R. App. P. 4. Petitioners pledged to file a "second appeal" after the district court ruled on their as-yet-not-filed intervention motion, and also promised to "move to consolidate that second appeal with this protective appeal." Pet. App.

A21. Once again, Petitioners cited no rule or court decision sanctioning such procedures.

On October 23, 1990 the district court granted Petitioners' Motion to Intervene, pursuant to Fed. R. Civ. P. 24. The court did not discuss or rule on the adequacy of Petitioners' "protective appeal" for purposes of establishing appellate jurisdiction. *See* Pet. App. A14-A18. In considering the timeliness of Petitioners' Motion to Intervene, the district court simply held that as of July 23, 1990, "once final judgment was entered, the taxpayers had a legal interest which satisfied the requirements of Rule 24." *Id.* A18.[4]

D. Proceedings Before the Court of Appeals

On September 8, 1990, the respondents other than the State filed a joint motion to dismiss Petitioners' "protective appeal."[5] Respondents later timely appealed the district court's October 23, 1990 intervention order. Also within thirty days of that order, on November 21, 1990, Petitioners filed another Notice of Appeal concerning the district court's July 23, 1990 decision. Although this "second appeal" was filed fully four months after the July 23 Order, Petitioners claimed it was timely because of their original "protective appeal." Respondents filed a motion to dismiss Petitioners' "second appeal" on the grounds that it failed to satisfy Fed. R. App. P. 4, and

[4] Thus, Petitioners mislead in alleging the district court ruled their interests were "impaired," so as to justify a motion to intervene, no sooner than August 20, 1992, when the KCMSD Board formally approved the property tax levy increase authorized on July 23. *See* Pet. 6.

[5] The United States Court of Appeals for the Eighth Circuit granted the motion to dismiss on October 26, 1990 on the grounds that Petitioners were not parties in the district court. Pet. App. A13. The Court of Appeals apparently was unaware of the district court's Order of October 23, 1990 granting Petitioners' Motion to Intervene. Accordingly, the Court of Appeals later vacated its initial dismissal order. *See id.* A10.

could not be saved by the invalid prior "protective appeal."

The Court of Appeals consolidated for joint consideration the related appeals and motions concerning both the propriety of Petitioners' intervention and the existence of appellate jurisdiction to review the district court's July 23, 1990 decision. Pet. App. A3-A4. On June 30, 1992, the Court of Appeals unanimously dismissed Petitioners' appeals, stating:

> no effective notice of appeal has been filed to confer jurisdiction on the court. When the Clark group filed its first notice of appeal, its members were not parties to this suit and had not even asked to become parties.

Id. A4.[6] Furthermore, the Court declared: "we do not reach the merits of [Petitioners'] appeal[s] due to jurisdictional defect." *Id.* A6. Petitioners did not seek en banc review in the Court of Appeals.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to grant certiorari in order to consider granting relief that would be inconsistent with well-established limits on the powers of the federal judiciary. First, Petitioners urge the Court to review the Court of Appeals' routine application of Fed. R. App. P. 4 and settled principles of appellate jurisdiction, which strictly limit appeals by non-parties. No significant issue of federal law is posed by the Court of Appeals' conclusion that Petitioners' appeal was defective because Petitioners failed to seek party status before the time to file an appeal had expired. Moreover, this ruling did not create a conflict with any other federal appellate decision and did not misapply any decision of this Court.

---

[6] The Court of Appeals also ruled, and Petitioners do not dispute in this Court, that "[t]he second notice of appeal was filed grossly out of time, with no attempt made to obtain any extension of the deadline for noticing the appeal." Pet. App. A5.

There also is no merit to Petitioners' request that the Court consider the Eighth Circuit's supposed misapplication of the *Jenkins II* decision. Petitioners themselves acknowledge this issue was not decided by the Court of Appeals. Petitioners stray even further from guidelines governing this Court's certiorari jurisdiction in requesting a remand order amounting to an advisory opinion on matters addressed by neither of the lower courts in this case. In short, there are no "special and important reasons" for this Court to grant the Petition, Sup. Ct. R. 10.1, and several such grounds dictating that the Petition be denied.

I. THE EIGHTH CIRCUIT'S DISMISSAL OF PETITIONERS' APPEAL, FOR FAILURE TO ESTABLISH APPELLATE JURISDICTION, WAS BASED ON CLEAR LEGAL PRINCIPLES AND PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW WORTHY OF THE COURT'S REVIEW

The Petition for Certiorari is unfounded because Petitioners seek review of an Eighth Circuit decision that was based on clear legal principles established by this Court. Petitioners certainly offer no reason for this Court to reconsider the Court of Appeals' conclusion that "'[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.'" Pet. App. A4, *quoting Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). *See id.*, *citing Karcher v. May*, 484 U.S. 72, 77 (1987) (holding that appellate rights, if any, must derive from a person's or entity's status as a party before the district court). Petitioners likewise fail to present any basis for this Court to grant a Petition that calls into question the longstanding principle that the filing of a proper appeal within time limits prescribed by the federal appellate rules "is mandatory and jurisdictional." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 203 (1988); *United States v. Robinson*, 361 U.S. 220, 229 (1960).

Undisputed facts demonstrate, as the Eighth Circuit found, that Petitioners failed to comply with these rules. *See* Pet. App. A4-A5. Plainly, as of August 22, 1990, the date on which the time to appeal the district court's July 23, 1990 Order expired, Petitioners neither were parties, nor had sought status as such. In addition, Petitioners do not deny that prior to the end of the thirty-day appeal period, they never "asked for an expedited decision [on a motion to intervene] or an extension of the time to appeal, [pursuant to] Fed. R. App. P. 4(a)(5)." Pet. App. A6.[7]

Fifteen years ago, this Court held that a motion to intervene in the district court, for the purpose of appealing a district court order, "was required to [comply with] the time limitation for lodging an appeal prescribed by Fed. Rule App. Proc. 4(a)." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392 (1977). The *United Airlines* Court also declared that this conclusion was consistent with the Court's prior ruling, in *NAACP v. New York*, 413 U.S. 345 (1973), that the timeliness of an intervention motion was to be determined "in view of all the circumstances." 432 U.S. at 395-96. The Court of Appeals in this case expressly relied on the Court's *United Airlines* ruling, Pet. App. A6, and Petitioners have offered no valid reason for the Court to question this judgment. Petitioners also present no subsequent authority supporting a different rule.[8] Thus, Petitioners' sug-

---

[7] It is clear that the filing of a notice of appeal in itself may not be read to include "by implication" a Rule 4(a)(5) motion for extension of time. *Campbell v. White*, 721 F.2d 644, 646-47 (8th Cir. 1983). *Accord Washington v. Bumgarner*, 882 F.2d 899, 901 (4th Cir. 1989) (collecting cases), *cert. denied*, 493 U.S. 1060 (1990).

[8] On the contrary, other federal appellate courts have followed *United Airlines*. *See, e.g., United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1395 (9th Cir. 1992); *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1229 (6th Cir. 1984). *See also United Airlines*, 432 U.S. at 395-96 n.16 (collecting cases).

gestion that this Court must grant certiorari in order to maintain the integrity of *United Airlines* or *NAACP v. New York* is baseless.

Petitioners' only other legal arguments are wholly without legal support and do not justify a grant of certiorari. For instance, Petitioners cite numerous cases as if they endorse the notion of a non-party filing a "protective" notice of appeal, and support the approach taken by Petitioners in this case. *See* Pet. 9-10. Yet not one of these decisions holds that a notice of appeal by a non-party is rendered effective by a motion to intervene filed in the district court *following* the expiration of the 30-day appeal deadline. *Id.*[9] Petitioners also suggest, for the first time in this Court, that various decisions granting non-parties rights to appeal in "unique" circumstances support Petitioners' claim in this case, simply because Petitioners' self-inflicted procedural dilemma also presents an "unusual" situation. *Id.* 10. However, Petitioners fail to rebut the Court of Appeals' straight-forward rejection of such arguments or to justify asking this Court to rule on matters they declined to raise with the Court of Appeals. *See* Pet. App. A4-A5.

Petitioners also ask this Court to entertain equitable arguments, rejected by the Court of Appeals, that are founded on a misleading account of the record and a misreading of the law. These contentions also are no grounds for this Court to review the merits of this matter. Despite Petitioners' continued allusion to their confinement in a "procedural box," Pet. 15, they do not account for their numerous procedural defaults below, which should preclude a grant of certiorari. To excuse their inattention to Fed. R. App. P. 4(a)(5), Petitioners mischaracterize it as imposing a "maximum 30-day extension" limit, Pet. 16, while in fact, the rule plainly permits

---

[9] *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (reversing denial of intervention motions filed by appellants, without discussing issue of timeliness).

a district court significant flexibility. Petitioners also suggest this Court should take this case to decide whether a non-party that has only two days to act is "effectively foreclosed" from filing an intervention motion prior to expiration of an appeal deadline. *Id.* 15. Such a question poses no important federal legal issue, and flatly ignores extensive evidence in the record directly contrary to Petitioners' claims of prejudice. *See* Pet. App. A5-A6.[10]

This Court consistently has recognized that vital interests are served by clear rules regarding the finality of judgments and certain time limits for invoking the jurisdiction of the federal courts of appeals. *See, e.g., Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 264-65 (1978). Upholding these principles is all the more important in this matter, which involves a settlement of disputed claims in the context of complex constitutional litigation. Petitioners urge this Court to ignore the favor the law historically has accorded settlements, *see, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) (discussing Fed. R. Civ. P. 68), and to disregard the disfavor the federal courts generally have accorded post-judgment intervention, especially in cases such as this, in which the number of potential non-party intervenor-appellants is large, and the possibility of disruption of a constitutional remedy is great. *See, e.g., United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986). In light of the clear authorities on which the Court of Appeals' dismissal order was based, and the Petitioners' failure to take full advantage of the ample procedural opportunities available to them, Respondents respectfully urge the Court not to encourage Petitioners'

---

[10] In particular, Petitioners declined to seek any extension of time to appeal. They also admit elsewhere in their brief that the district court held their interests were "impaired" as of July 23, 1990, *not* on August 20, 1990; thus, Petitioners concede that they knew at least 30 days before the appeal deadline that they would have to move to intervene in order to challenge the parties' settlement. *See* Pet. 11.

disregard of the rules of procedure by granting the Petition for Certiorari.

II. THE COURT SHOULD DECLINE TO CONSIDER ISSUES NOT REACHED BY THE COURT OF APPEALS AND RELIEF NEVER SOUGHT BY PETITIONERS IN EITHER OF THE LOWER COURTS

Petitioners' prayer that the Court grant certiorari to address issues related to *Jenkins II* is wholly unfounded and inappropriate. Petitioners admit the Court of Appeals did not rule on any substantive aspect of the district court's orders, including the district court's analysis of the parties' salary increase settlement agreement in light of *Jenkins II*. *See* Pet. 18 n.10 ("The Court of Appeals did not reach the merits due to the 'jurisdictional defect' "); *id.* 7 ("The [C]ourt [of Appeals] deemed Petitioners 'protective' notice of appeal 'ineffective' to confer jurisdiction"). Because the Court of Appeals only decided the procedural question whether Petitioners' post-judgment submissions satisfied Fed. R. App. P. 4, it would be contrary to this Court's precedents to review the merits of the district court's Orders of July 23 and October 23, 1990. *Budinich*, 486 U.S. at 203 ("[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction"). In short, this Court has before it no question of federal law, important or otherwise, concerning the propriety of desegregation funding under *Jenkins II*. Accordingly, review should be denied on the second question presented by Petitioners.

Petitioners' discussion of due process issues unrelated to *Jenkins II* also makes clear that the Petition raises no serious issue of the misapplication of *Jenkins II*. Petitioners assert that the district court employed inadequate procedures at its fairness hearing, by giving insufficient consideration to the views of persons potentially affected by the parties' proposed salary settlement agreement. The validity of this contention is an issue separate and distinct from the question whether the district court au-

thorized a tax increase using minimally obtrusive methods, as *Jenkins II* requires. Contrary to the suggestions of Petitioners, *see* Pet. 18-20, *Jenkins II* has nothing to say about the proper conduct of a "fairness hearing." Moreover, Petitioners fail to present any support for their allegation that this Court's decisions indicate the district court's fairness hearing procedures denied them adequate notice and a meaningful opportunity to present their views.[11] In any event, this Court should not address due process issues the Court of Appeals did not reach before dismissing Petitioners' appeal.

Finally, Petitioners make an outlandish request that this Court grant certiorari in order to adopt six "specific principles" to guide the lower courts' review of any future desegregation-related property tax levy increase proposals. *See* Pet. 20-22. Most of the propositions favored by Petitioners never have been presented to either of the lower courts.[12]

In effect, Petitioners ask this Court to issue an advisory opinion, in contravention of its duties under Article III of the U.S. Constitution. The Court previously has stated that it will not reach such questions "abstracted . . . from the immediate considerations which should determine the disposition of [a] motion[] to dismiss . . . ." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). In addition, "it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is

---

[11] Thus, Petitioners' due process arguments present no important federal legal issues. Rather, granting certiorari to consider such matters would require the Court to act as a finder of fact, a task it has consistently held it should not assume. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

[12] Several of the pronouncements desired by Petitioners not only raise new issues for the first time in this Court, but also are inconsistent with *Jenkins II*. For example, Petitioners' Points 2 through 5 would impose requirements on the district court and the parties beyond those the Court approved in *Jenkins II*. *See* Pet. 21-22.

that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968). *Accord Mistretta v. United States*, 488 U.S. 361, 385 (1989). As this Court noted in *Fruehauf*, advisory opinions are inappropriate because they constitute "advance expressions of legal judgment" upon "unfocused" issues "not pressed before the Court with that clear concreteness provided when a question [is] precisely framed and necessary for decision." 365 U.S. at 157. Therefore, it would be inconsistent with Article III for the Court to use the Petition in this case as an open-ended "opportunity to instruct the lower courts and the parties," Pet. 8, on matters not properly before it.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

ARTHUR A. BENSON, II
ARTHUR BENSON & ASSOCIATES
Suite 1125
1000 Walnut Street
Kansas City, Missouri 64106
(816) 842-7603
Counsel for Respondents Kalima Jenkins, et al.

SCOTT A. RAISHER
JOLLEY, WALSH & HAGER, P.C.
204 W. Linwood
Kansas City, Missouri 64111
(816) 561-3755
Counsel for Respondent American Federation of Teachers, Local 691

* Counsel of Record

DAVID S. TATEL
ALLEN R. SNYDER *
PATRICIA A. BRANNAN
DANIEL B. KOHRMAN
HOGAN & HARTSON
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY WARD KEELER
BLACKWELL SANDERS MATHENY WEARY AND LOMBARDI
Two Pershing Square
2300 Main Street
Kansas City, Missouri 64141
(816) 274-6816
Counsel for Respondents Kansas City, Missouri School District, et al.

November 23, 1992